

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 18, 2014

v

DEANGELO MICHAEL ANTHONY,

Defendant-Appellant.

No. 313433
Oakland Circuit Court
LC No. 2009-225796-FC

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Deangelo Michael Anthony appeals by leave granted the trial court's order denying his request for resentencing. Because the trial court did not err when it refused to change the scoring of the offense variables (OVs) or resentence Anthony, we affirm.

A jury convicted Anthony of conspiracy to commit armed robbery, MCL 750.157a, and armed robbery, MCL 750.529. The trial court sentenced him to serve 20 to 40 years in prison for each conviction, which sentences were to be served concurrently. Anthony then appealed to this Court. This Court affirmed his convictions, but remanded the case to the trial court for reconsideration of its decision to score OV 7 at 50 points in light of the decision in *People v Hunt*, 290 Mich App 317; 810 NW2d 588 (2010). The trial court held a hearing on remand and determined that OV 7 should remain at 50 points and, for that reason, denied Anthony's request for resentencing. Because the trial court did not enter a written order, Anthony filed a complaint for superintending control with this Court and this Court required the trial court to enter an order related to its scoring of OV 7 and resentencing. After the trial court entered its written order, Anthony requested leave to appeal, which this Court granted.

Anthony's convictions arise from his participation in the robbery of Dalphine McCurtis. Anthony, along with two accomplices, approached McCurtis while she was sitting in her van in a hotel parking lot. Anthony threatened her with a firearm and demanded money. He then fought with McCurtis, striking her multiple times on the head with his firearm. Eventually, Anthony succeeded in taking over \$200 from McCurtis. After Anthony fled, one of his accomplices shot McCurtis four times in the stomach.

Anthony argues that the trial court clearly erred when it found that he engaged in conduct that amounted to excessive brutality for purposes of scoring OV 7 at 50 points. “Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “The clear-error standard is highly deferential; an appellate court will only determine that a trial court’s finding is clearly erroneous when, after a review of the entire record, it is left with the definite and firm conviction that the trial court has made a mistake.” *People v Gioglio (On Remand)*, 296 Mich App 12, 20-21; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Hardy*, 494 Mich at 438.

OV 7 addresses whether the defendant engaged in aggravated physical abuse of a victim during the commission of the scoring offense. See MCL 777.37(1). Under OV 7, a trial court must assess 50 points if “a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). If Anthony’s conduct falls under any of the four categories, 50 points must be scored. *Hardy*, 494 Mich at 439-440. “[E]xcessive brutality means savagery or cruelty beyond even the ‘usual’ brutality of a crime.” *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev’d on other grounds *Hardy*, 494 Mich at 430. To be convicted of armed robbery, a defendant must use “force or violence against any person who is present at a larceny or assault[] or put[] the person in fear in the course of committing a larceny.” *Hardy*, 494 Mich at 446 (citations omitted). The defendant must also “either (1) possess a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or (2) represent orally or otherwise that he or she is in possession of a dangerous weapon.” *Id.* (citation removed).

Here, Anthony physically fought with McCurtis and repeatedly struck her on the head with his firearm, which is conduct beyond the usual brutality related to brandishing or claiming to have a firearm and placing the victim in fear. Accordingly, the trial court did not err in scoring OV 7 at 50 points. Moreover, we reject Anthony’s argument that the trial court impermissibly considered his accomplice’s shooting in scoring OV 7, which he claims violated the rule stated in *Hunt*, 290 Mich App 317. In *Hunt*, this Court held that 50 points may be scored for OV 7 only for “specific acts of sadism, torture, or excessively brutal acts *by the defendant*.” *Id.* at 324 (emphasis in original). However, here, the trial court properly considered only Anthony’s actions.

Anthony also argues that the trial court erred in determining that his conduct was designed to substantially increase the fear and anxiety a victim suffered during the offense. In *Hardy*, the court explained:

Since the “conduct designed” category only applies when a defendant’s conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue. To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied.

Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. As noted above, evidence which satisfies an element of an offense need not be disregarded solely for that reason. Instead, all relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount. [*Hardy*, 494 Mich at 442-443.]

"The relevant inquires are [thus] (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id.* at 443-444.

Armed robbery may be committed by brandishing a firearm or representing that one has a firearm. See *id.* at 446. Although the fear or anxiety associated with the minimal conduct involved in armed robbery is high because of a concern of physical harm, Anthony engaged in conduct beyond the minimum necessary to complete the offense. He actually used force against McCurtis. And, we conclude that the evidence was sufficient to support the trial court's finding that he used force to increase McCurtis's fear or anxiety. See *id.* at 446-447. Because a preponderance of the evidence established that Anthony's conduct went beyond that necessary to effectuate an armed robbery and was done to increase McCurtis's fear by a considerable amount, the trial court did not clearly err in scoring OV 7 at 50 points.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause